KETUA POLIS DAERAH SHAH ALAM & ORS v. NOR AZURA AMZAH & ANOR AND ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
MOHD ZAWAWI SALLEH JCA
VERNON ONG LAM KIAT JCA
ASMABI MOHAMAD JCA
[CIVIL APPEALS NO: B-01(NCVC)(W)-117-04-2016 &
B-02(NCVC)(W)-866-05-2016]
5 DECEMBER 2017

TORT: *Damages – Award – Claim for assault and battery and alternatively, negligence and public misfeasance – Police personnel fired gunshots at car driven by 14-year old during car chase – Deceased died of gunshot wound – Claim by deceased's joint administratrix – Whether there was contributory negligence by deceased – Whether contributory negligence a defence – Whether sum awarded appropriate – Whether sum awarded fair and reasonable*

TORT: *Misfeasance – Misfeasance in public office – Claim for assault and battery and alternatively, negligence and public misfeasance – Police personnel fired gunshots at car driven by 14-year old during car chase – Deceased died of gunshot wound – Claim by deceased's joint administratrix – Whether tort of public misfeasance proved*

In the course of a car chase, police personnel ('the first defendant') fired gunshots to the car driven by one Aminulrasyid ('the deceased'), then of 14 years of age, causing the deceased to die of a gunshot wound. At the High Court, the deceased's sister and mother ('the plaintiffs'), as the joint administratrix of the deceased under s. 8 of the Civil Law Act 1956 ('the CLA'), claimed against the (i) first defendant for assault and battery and alternatively, negligence and public misfeasance; and (ii) the second to fifth defendants for being vicariously liable for the acts of the first defendant. The deceased's mother also claimed as a dependent of the deceased under s. 7 of the CLA. The High Court Judge ('the HCJ') awarded (i) RM150,000 for general damages; (ii) RM150,000 for damages for misfeasance (iii) RM150,000 for aggravated/exemplary damages; (iv) RM10,000 for bereavement; (v) RM4,800 for special damages; and (vi) RM50,000 for costs. Hence, the present appeals by the first defendant and the second to fifth defendants. The first defendant submitted that (i) there was no evidence to show that the first defendant discharged the fatal shots and even if there was, his conduct was justified and reasonable; (ii) the deceased was contributorily negligent in that he failed to stop the car as instructed and sped to evade arrest and therefore, the police personnel suspected the deceased of being a criminal as the car was driven in an aggressive and dangerous manner; (iii) the claim of misfeasance in public office against the third defendant was unfounded as

A the three ingredients of the tort were not pleaded; and (iv) the HCJ erred in awarding aggravated or exemplary damages on the ground that the third defendant's press statement about the deceased was malicious. The plaintiffs argued that (i) it was the first defendant who fired the gunshots and there was no justification for him to do so as the Inspector General Standing Orders and
B s. 15(3) of the Criminal Procedure Code clearly provides that shots could not be fired unless the police officer finds himself in a situation where he is under attack and he believes that his life is in danger or under threat of grievous injury. Evidence showed that, at the time the fatal shot was fired, the deceased posed no threat to the police personnel; (ii) contributory negligence
C was not a defence in cases of assault and battery; (iii) all necessary facts have been proved to satisfy the three ingredients of the tort of misfeasance in public office; and (iv) RM150,000 was a fair and reasonable amount for damages for pain and suffering.

Held (allowing appeal in part):

D **Per Vernon Ong Lam Kiat JCA delivering the judgment of the court:**

(1) There was no evidence that there were other road users in Jalan Tarian 11/2 at the material time. Jalan Tarian 11/2 was a housing area and the area was empty and quiet as, when the shooting took place, it was the early hours of the morning. Based on evidence, the deceased was driving
E his car away from the police when the first defendant fired the fatal shot. Furthermore, by the time the deceased's car arrived at the housing area of Jalan Tarian 11/2, the car tyres were already punctured. More significantly, the first defendant admitted under cross-examination that the deceased posed no danger at the time he fired the fatal shot. (para
F 10)

(2) When the first defendant fired his weapon, the weapon was set on auto mode instead of manual mode. Consequently, 21 bullets were discharged in the direction of the deceased's car. The fact that the first defendant fired the fatal shot was undisputed. He admitted that his patrol
G car was behind the deceased's car and was pursuing it when the shots were fired. The first defendant further admitted that it was wrong for him to have done that. This was a patent instance of negligence on the part of the first defendant. On the totality of the evidence, the action of the first defendant in firing the fatal shot which resulted in the death of
H the deceased was clearly unwarranted, unreasonable and unjustified. The defendant's argument of contributory negligence was not a defence. However, the plaintiffs failed to prove the tort of misfeasance in public office. (paras 11 & 12)

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(3) The plaintiffs failed to prove the damages for pain and suffering under general damages. As there was also no evidence to show that the second plaintiff depended on the deceased for sustenance, the dependency claim was unsustainable. As for general damages, RM150,000 was manifestly excessive and RM100,000 was a more reasonable and fair amount. Accordingly, the amount of general damages was reduced to RM100,000. The awards for special damages and bereavement by the HCJ were affirmed while the award of RM150,000 for the tort of misfeasance in public office was set aside. The award of RM150,000 for aggravated/exemplary damages was also set aside. The costs of the High Court were maintained.

Bahasa Malaysia *Headnotes*

Dalam satu kejadian kejar-mengejar kereta, seorang pegawai polis ('defendan pertama') melepaskan tembakan ke arah sebuah kereta yang dipandu oleh seorang bernama Aminulrasyid ('si mati'), yang ketika itu berumur 14 tahun, menyebabkan si mati meninggal dunia akibat luka tembakan. Di Mahkamah Tinggi, kakak dan ibu si mati ('plaintif-plaintif'), sebagai pentadbir bersama si mati bawah s. 8 Akta Undang-Undang Sivil ('AUS'), menuntut terhadap (i) defendan pertama bagi serangan dan serangan sentuh dan alternatifnya, kecuaian dan misfeasans awam; dan (ii) defendan kedua hingga kelima kerana bertanggungan bersesama atas tindakan-tindakan defendan pertama. Ibu si mati juga menuntut sebagai tanggungan si mati bawah s. 7 AUS. Hakim Mahkamah Tinggi ('HMT') mengawardkan (i) RM150,000 bagi ganti rugi am; (ii) RM150,000 bagi ganti rugi misfeasans; (iii) RM150,000 bagi ganti rugi teruk/teladan; (iv) RM10,000 bagi kematian; (v) RM4,800 bagi ganti rugi khas; dan (vi) RM50,000 bagi kos. Maka timbul rayuan-rayuan ini oleh defendan pertama dan defendan kedua hingga kelima. Defendan pertama menghujahkan (i) tiada keterangan yang menunjukkan defendan pertama melepaskan tembakan maut dan jika pun ada, tindakan tersebut beralasan kukuh dan munasabah; (ii) si mati turut serta cuai kerana tidak menghentikan kereta seperti yang diarahkan dan memandu laju untuk mengelak tertangkap dan dengan itu, pegawai polis mengesyaki si mati seorang penjenayah kerana kereta tersebut dipandu secara agresif dan merbahaya; (iii) tuntutan misfeasans penjawat awam terhadap defendan ketiga tidak berasas kerana tiga inti pati tort tidak diplidkan; dan (iv) HMT terkhilaf dalam mengawardkan ganti rugi teruk atau teladan atas alasan kenyataan akhbar tentang si mati berniat jahat. Plaintif-plaintif mendalihkan (i) defendan pertama yang melepaskan tembakan dan tiada alasan kukuh untuknya berbuat demikian kerana Arahan-Arahan Ketua Polis Negara dan s. 15(3) Kanun Tatacara Jenayah jelas memperuntukkan tembakan tidak boleh dilepaskan kecuali jika pegawai polis tersebut mendapati dirinya dalam situasi bawah serangan dan dia percaya dirinya dalam bahaya atau diancam dengan kecederaan parah.

Keterangan menunjukkan, semasa tembakan maut tersebut dilepaskan, si mati tidak mengancam nyawa pegawai polis tersebut; (ii) kesertaan kecuaian bukan pembelaan dalam kes-kes serangan dan serangan sentuh; (iii) kesemua fakta penting telah dibuktikan untuk memenuhi ketiga-tiga inti pati tort misfeasans penjawat awam; dan (iv) RM150,000 adalah jumlah yang adil dan munasabah bagi ganti rugi kesakitan dan penderitaan.

Diputuskan (membenarkan sebahagian rayuan)
Oleh Vernon Ong Lam Kiat HMR menyampaikan penghakiman mahkamah:

(1) Tiada keterangan bahawa terdapat pengguna-penguna lain jalan raya di Jalan Tarian 11/2 pada masa material. Jalan Tarian 11/2 adalah kawasan perumahan dan kawasan tersebut kosong dan sunyi kerana tembak-menembak berlaku pada awal pagi. Berdasarkan keterangan, si mati memandu keretanya berlalu dari pihak polis semasa defendan pertama melepaskan tembakan maut tersebut. Tambahan lagi, semasa kereta si mati tiba di kawasan perumahan Jalan Tarian 11/2, tayar-tayar keretanya telah pancit. Lebih penting lagi, defendan pertama mengaku semasa pemeriksaan balas bahawa si mati tidak mengancam nyawanya semasa dia melepaskan tembakan maut tersebut.

(2) Semasa defendan pertama melepaskan tembakan senjatanya, senjata tersebut dalam mod automatik dan bukan mod manual. Akibatnya, 21 peluru dilepaskan ke arah kereta si mati. Fakta bahawa defendan pertama melepaskan tembakan maut tidak dipertikaikan. Dia mengaku kereta rondanya berada di belakang kereta si mati dan sedang merapatinya ketika tembakan dilepaskan. Defendan pertama mengaku selanjutnya bahawa salah untuknya berbuat demikian. Ini adalah contoh jelas kecuaian oleh defendan pertama. Berdasarkan keseluruhan keterangan tindakan defendan pertama dalam melepaskan tembakan maut yang mengakibatkan kematian si mati tidak wajar, tidak munasabah dan tidak beralasan kukuh. Hujahan defendan pertama tentang kesertaan kecuaian bukan pembelaan. Walau bagaimanapun, plaintif-plaintif gagal membuktikan tort misfeasans penjawat awam.

(3) Plaintif-plaintif gagal membuktikan ganti rugi kesakitan dan penderitaan bawah ganti rugi am. Oleh kerana tiada juga keterangan yang menunjukkan plaintif kedua bergantung pada si mati untuk hidup, tuntutan tanggungan juga tidak dikekalkan. Bagi ganti rugi am, RM150,000 jelas melampau dan RM100,000 adalah jumlah yang adil dan munasabah. Oleh itu, jumlah ganti rugi am dikurangkan kepada RM100,000. Ganti rugi bawah ganti rugi khas dan kematian oleh HMT disahkan manakala award RM150,000 bagi tort misfeasans penjawat awam diketepikan. Award RM150,000 bagi ganti rugi teruk/teladan diketepikan. Kos Mahkamah Tinggi dikekalkan.

Case(s) referred to:
Broome & Another v. Cassell & Co [1972] AC 1027 ***(refd)***
Co-operative Group (CWS) Ltd v. Pritchard [2012] 1 All ER 205 ***(refd)***
Ketua Setiausaha Kementerian Dalam Negeri & Yang Lain lwn.Ghaur Chandram Murugesu & Satu Lagi Rayuan [2016] 3 CLJ 210 CA ***(refd)***
Mariayee Veeran & Anor v. Mohammad Nasir Mohamed Ali & Anor [1985] 1 CLJ 416; [1985] CLJ (Rep) 224 FC ***(refd)***
N Indra Nallathamby v. Datuk Seri Khalid Abu Bakar & Ors [2013] 6 CLJ 272 CA
Rookes v. Barnard [1964] AC 1129 ***(refd)***
Three Rivers District Council & Ors v. Bank Of England (No 3) [2000] 3 All ER 1 ***(refd)***
Thompson v. Comr of Police of the Metropolis [1998] 1 All ER 498 ***(refd)***

Legislation referred to:
Civil Law Act 1956, ss. 7, 8
Criminal Procedure Code, s. 15(3)

(Civil Appeal No: B-01(NCVC)(W)-117-04-2016)
For the appellant - Normastura Ayub & Nurhasmanita Abdul Manap; SFCs
For the respondent - N Surendran, Latheefa Koya & Shahid Adli Kamaruddin; M/s Daim & Gamany

(Civil Appeal No: B-02(NCVC)(W)-866-05-2016)
For the appellant - Zulkepli Omar; M/s Lainah Yaacob & Zulkepli
For the respondent - N Surendran, Latheefa Koya & Shahid Adli Kamaruddin; M/s Daim & Gamany

[Editor's note: Appeal from High Court, Shah Alam; Civil Suit No: 21 NCVC-38-04-2013 (overruled in part).]

Reported by Najib Tamby

JUDGMENT

Vernon Ong Lam Kiat JCA:

Introduction

[1] The appeals herein emanate from the decision of the High Court at Shah Alam on a claim for assault and battery and alternatively negligence and public misfeasance, arising from fatal gunshot wounds inflicted upon Aminulrasyid bin Amzah (the deceased) by police personnel, including the first defendant, in an incident that occurred on 26 April 2010.

[2] The first and second plaintiffs sued as the joint administratrix of the deceased under s. 8 of the Civil Law Act 1956 (CLA 1956) and the second plaintiff, as a dependent of the deceased under s. 7 of the CLA 1956 for the death of the deceased. The second to the fifth defendants are sued for being vicariously liable for the acts of the first defendant and other police personnel; the second defendant being also sued for misfeasance in public office.

[3] The defendants deny liability for any injury and suffering of the deceased on the ground that the first defendant and other police personnel acted reasonably and according to correct procedure.

[4] After a full trial of the action, the learned judge allowed the plaintiffs' claim and awarded the following heads of damages:

(i) RM150,000 for general damages;

(ii) RM150,000 for damages for misfeasance;

(iii) RM150,000 for aggravated/exemplary damages;

(iv) RM10,000 for bereavement;

(v) RM4,800 for special damages; and

(vi) RM50,000 costs.

[5] The first defendant and the second to fifth defendants being dissatisfied with the decision of the High Court have lodged their respective appeals against the finding of liability and on damages. In this judgment, the parties shall be referred to as they were in the court below.

Salient Facts

[6] The background facts have been comprehensively set out in paras. 11 to 16 of the written judgment of the learned judge. Insofar as this appeal is concerned, it is sufficient to allude to the following key facts. The fatal shots were discharged in the course of a car chase by the police personnel. The deceased, then of 14 years of age, was driving his sister's car and in the front passenger seat was his friend one Mohd Azamuddin (SP4). Two of the police personnel discharged their firearms at the vehicle driven by the deceased. The deceased died of a gunshot wound to the back of his head.

Submission Of Counsel

[7] Learned Senior Federal Counsel (SFC) for the first defendant advanced six main points. First, learned SFC argued that there is no evidence to show that the first defendant discharged the fatal shots. Second, she argued that even if there is, in all the circumstances the first defendant's conduct was justified and reasonable. Third, there was contributory negligence on the part of the deceased; in particular, (i) the deceased failed to stop the car when he was instructed by the police, (ii) the deceased's car was speeding to evade arrest, (iii) as the police personnel suspected the deceased of being a criminal, there was a 'hot pursuit' after the deceased's car failed to stop and was driven in an aggressive and dangerous manner, and (iv) the deceased exposed himself, his passenger and other road users in a dangerous situation. Learned SFC submitted that liability should be apportioned on the basis of 75%

against the deceased and 25% against the first defendant. Fourth, learned SFC argued that the claim of misfeasance in public office against the third defendant (then the Chief Police Officer of Selangor) is unfounded as the three ingredients of the tort have not been pleaded or proved (*Three Rivers District Council & Ors v. Bank Of England (No. 3)* [2000] 3 All ER 1 HL). The facts relied on by the plaintiffs relate to defamation and not to the tort of misfeasance in public office. Fifthly, it was contended that damages for pain and suffering should not have been allowed. The plaintiffs did not prove that they were suffering from any recognisable psychiatric illness due to the death of the deceased. Lastly, learned SFC argued that learned judge had erred in awarding aggravated or exemplary damages on the ground that the third defendant's press statement about the deceased was malicious. Award of aggravated or exemplary damages are only awarded for injured feelings or for humiliating circumstances (*Broome & Another v. Cassell & Co* [1972] AC 1027, 1224; *Thompson v. Comr of Police of the Metropolis* [1998] 1 All ER 498, 516). There was also no evidence to show that the third defendant's press statement was oppressive, arbitrary or unconstitutional (*Rookes v. Barnard* [1964] AC 1129).

[8] In reply, learned counsel for the plaintiffs submitted that only two persons fired the shots, ie, the first defendant and SD4. However, SD4 did not fire any shots after Bulatan Kayangan. Therefore, only the first defendant could have fired the fatal shot which killed the deceased. There was no justification for the first defendant to have fired the shots because the Inspector General's Standing Orders (IGSO) and s. 15(3) of the Criminal Procedure Code clearly provides that shots cannot be fired unless the police officer finds himself in a situation where he is under attacked and he believes that his life is in danger or under threat of grievous injury. The evidence clearly showed that at the time the fatal shot was fired, the deceased posed no threat to the police personnel. Learned counsel also argued that contributory negligence is not a defence in cases of assault and battery (*Co-operative Group (CWS) Ltd v. Pritchard* [2012] 1 All ER 205, 222 CA). Further, it was submitted that all the ingredients in the tort of misfeasance have been pleaded in the statement of claim. All the necessary facts have been proved to satisfy the three ingredients of the tort of misfeasance in public office. The third defendant never retracted his statement and did not come to court to explain or clarify.

[9] As for damages for pain and suffering, learned counsel submitted that the estate claim was made under ss. 7 and 8 of the Civil Law Act 1956 and that RM150,000 is a fair and reasonable sum in the circumstances. The plaintiffs were entitled to aggravated and exemplary damages because of the oppressive and arbitrary actions of the defendants (*N Indra Nallathamby v. Datuk Seri Khalid Abu Bakar & Ors* [2013] 6 CLJ 272 (CA); *Rookes v. Barnard, (supra)*.

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Decision

[10] We agree with the learned judge's findings that (i) there was no evidence that there were other road users in Jalan Tarian 11/2 at the material time, (ii) that Jalan Tarian 11/2 is a housing area, and (iii) that during the time of the shooting, it was early hours of the morning and the area was
B empty and quiet. Based on the evidence on record, the deceased was driving his car away from the police when the first defendant fired the fatal shot. Further, by the time the deceased's car arrived in the housing area of Jalan Tarian 11/2, the car tyres were already punctured. More significantly, the first defendant admitted under cross-examination that the deceased posed no
C danger at the time he fired the fatal shot. As such, we agree with the learned judge's finding that the deceased did not pose any threat to the police personnel.

[11] We also note that when the first defendant fired his weapon, the weapon was set on auto mode instead of manual mode; consequently,
D 21 bullets were discharged in the direction of the deceased's car. The fact that the first defendant fired the fatal shot is undisputed; he admitted that his patrol car was behind the deceased's car and pursuing it when the shots were fired. The first defendant candidly admitted that it was wrong for him to have done that. In our view, this is a patent instance of negligence on the part of
E the first defendant. On the totality of the evidence, the action of the first defendant in firing the fatal shot which resulted in the death of the deceased was clearly unwarranted, unreasonable and unjustified. As for the defendant's argument of contributory negligence, we agree with the submission of learned counsel for the plaintiffs that contributory negligence
F is not a defence in this instance.

[12] In regard to the tort of misfeasance in public office, however, we agree with the submission of learned SFC that on the pleaded case and on the facts, the plaintiffs have not proved the tort of misfeasance in public office.

G **[13]** As for the award of general damages for pain and suffering, we also agree with learned SFC that the plaintiffs have failed to prove the damages for pain and suffering under this head of damages. Similarly, as there is no evidence to show that the second plaintiff depended on the deceased for sustenance the dependency claim is unsustainable (see *Ketua Setiausaha Kementerian Dalam Negeri & Yang Lain lwn. Ghaur Chandram Murugesu & Satu*
H *Lagi Rayuan* [2016] 3 CLJ 210 (CA) which referred to *Mariayee Veeran & Anor v. Mohammad Nasir Mohamed Ali & Anor* [1985] 1 CLJ 416; [1985] CLJ (Rep) 224 (FC)). For general damages, however, we take the view that RM150,000 is manifestly excessive and that RM100,000 is a more reasonable and fair amount in the circumstances. Accordingly, we would

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reduce the amount of general damages to RM100,000. We affirm the awards for special damages and bereavement by the learned judge. Consequent on our decision in para. [11] preceding, the award of RM150,000 for the tort of misfeasance in public office is set aside.

[14] As there was an affirmative finding by the learned judge that there was no intention on the part of the first defendant, we do not think that it is appropriate to grant aggravated or exemplary damages. Accordingly, the award of RM150,000 for aggravated/exemplary damages is also set aside.

[15] In conclusion, the defendants' appeals are allowed in part. We make no order as to costs in this proceeding. The costs of the High Court are maintained.